

LAW OFFICES
KELLER AND HECKMAN

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
TELEX 40 95551 "KELMAN"
FACSIMILE (202) 434-4846

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

JOSEPH E. KELLER (1907-1994)
JEROME H. HECKMAN
WILLIAM H. BORGHESE, JR.
MALCOLM D. MACARTHUR
WAYNE V. BLACK
TERRENCE D. JONES
MARTIN W. BERCOVIC
JOHN S. ELDERO
RICHARD J. LEIGHTON
ALFRED S. REGIMERY
WILLIAM L. KOVACS
DOUGLAS J. BEHR
RAYMOND A. KOWALSKI
SHIRLEY A. COFFIELD
MICHAEL F. MORRONE
JOHN B. RICHARDS
JEAN SAVIGNY
JOHN B. DUBACK
PETER L. DE LA CRUZ
MELVIN S. DROZEN
LAWRENCE P. HALPRI
RALPH A. SIMMONS
RICHARD F. MANN

C. DOUGLAS JARRETT
SHEILA A. MILLAR
GEORGE G. MISKO
STEPHAN E. BECKER
PATRICK J. HURD
MARK A. SIEVERS
GAREN E. DODGE
DAVID G. SARVADI
JONATHAN R. SPENCER
CATHERINE R. NIELSEN
AMY N. RODGERS
ELLIOT BELUOS
MARK L. ITZKOFF
JEAN-PHILIPPE MONTFORT
ROSEMARIE A. KELLEY
T. PHILLIPS BECK
ARTHUR S. GARRETT III
LESLIE E. SILVERMAN
JOSEPH M. SANDRI, JR.
ELIZABETH N. HARRISON
ROBERT H. G. LOCKWOOD
CAROL MOORS TOTH
JOAN C. SYLVAIN

MARTHA E. MARRAPESE
DONALD T. WURTH
DAVID B. BERRY
S. DEBORAH ROSEN
DAVID R. JOY
FREDERICK A. STEARNS
TONY RUSSELL, EPPS
THOMAS C. BERGER
JOHN F. FOLEY
ALEXANDRE HENCK VON ZEBINSKY
PHILIP H. ANDREWS
JENNIFER A. BONANNO
JOHN REARDON
PATRICK W. RATKOWSKI

*NOT ADMITTED IN D.C.
*RESIDENT BRUSSELS

SCIENTIFIC STAFF
DANIEL S. DIXLER, PH. D.
CHARLES V. BREDER, PH. D.
ROBERT A. MATHEWS, PH. D., D.A.B.T.
JOHN P. MODDERMAN, PH. D.
JOHN F. FOLEY
JUSTIN C. POWELL, PH. D.
JANETTE HOUK, PH. D.
LESTER BORODINSKY, PH. D.
THOMAS C. BROWN
MICHAEL T. FLOOD, PH. D.
ANDREW P. JOVANOVIH, PH. D.

WRITERS DIRECT DIAL NUMBER

DOCKET FILE COPY ORIGINAL
EX PARTE OR LATE FILED

September 28, 1995

RECEIVED

(202) 434-4230

VIA HAND DELIVERY

SEP 28 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY **EX PARTE**

DOCKET FILE COPY ORIGINAL

Re: Ex Parte Presentation of DCL Associates, Inc.
PR Docket No. 93-144
RM-8117
RM-8030
RM-8029

93-253

Dear Mr. Caton:

On this date, the attached Ex Parte Presentation of DCL Associates, Inc. was submitted by Keller and Heckman to the Chairman and Commissioners in connection with the above-captioned proceeding. Copies were provided to the other Commission officials noted thereon. Pursuant to Section 1.1206(a)(1) of the Commission's Rules, 47 C.F.R. § 1.1206(a)(1), two copies of this letter are being filed herewith.

Should you have any questions, please contact the undersigned.

Sincerely,

Raymond A. Kowalski

Raymond A. Kowalski

Attachment

cc: The Honorable Reed E. Hundt
The Honorable James H. Quello
The Honorable Andrew C. Barrett
The Honorable Susan Ness
The Honorable Rachelle B. Chong

No. of Copies rec'd 012
Us: A B C D E

**Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

RECEIVED

SEP 28 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Amendment of Part 90 of the)
Commission's Rules to Facilitate)
Future Development of SMR Systems)
in the 800 MHz Frequency Band)

PR Docket No. 93-144
RM-8117, RM-8030
RM-8029

and

Implementation of Section 309(j))
of the Communications Act-Competitive)
Bidding 800 Mhz SMR)

PP Docket No. 93-253

To: The Commission

**EX PARTE PRESENTATION
OF DCL ASSOCIATES, INC.**

I. Background

In response to the September 18th, 1995 recommendations made by the Wireless Telecommunications Bureau regarding wide area licensing of 800 Mhz service, DCL Associates, Inc. ("DCL") hereby submits this Ex Parte Presentation pursuant to rule 1.1206. Thus far, DCL has filed the following comments in this proceeding: January 5th, 1995, DCL filed its Initial Comments; March 1st, 1995, DCL filed its Reply Comments; and, May 4th, 1995 DCL filed its first Ex Parte Presentation in this proceeding. This document, dated September 27th, 1995, represents DCL's second Ex Parte Presentation filed in this proceeding.

DCL is a management consulting firm which currently manages wireless

businesses in both the cellular and specialized mobile radio industries. DCL is one of very few firms which successfully manages stand alone cellular systems in competition with the large cellular companies of America. The Benton Harbor non-wireline cellular system, which DCL has managed since 1989, currently boasts nearly 6,000 subscribers and will gross approximately \$8 million in 1995 revenues.

DCL filed a Request For Extended Implementation on March 25, 1994 and received the unconditional grant thereof on August 31, 1994, long before the Commission released its Further Notice of Proposed Rulemaking regarding Docket No. 93-144 ("FNPRM"). DCL's planned wide area SMR network consists of more than 1,700 YX channels and will service approximately 10 million people with advanced SMR technology. DCL believes that its wide area SMR network, when completed, will be many times more profitable than its cellular successes. DCL's SMR client base consists of entrepreneurs and small businesses. DCL and its clients/investors strongly desire to participate in any wide area SMR licensing process and, in light of the proposed auctions, is currently evaluating various BEA's which would enhance its wide area network and for which it intends to bid in the upcoming 800 Mhz auctions.

II. Extended Implementations Granted Prior To The Release Of The FNPRM Should Be Grandfathered And Not Required to Rejustify Their Grants

SMR licensees who were granted extended implementation periods ("EIPs") prior to the release of the FNRPM in November of 1994, and unconditioned on its outcome, should be grandfathered and not required to rejustify such EIPs. When EIP requests are filed pursuant to section 90.629 of the Commission's rules, an applicant must demonstrate that the purpose, size and complexity of its proposed SMR system does indeed justify the grant of an EIP. When the Commission unconditionally granted

extended implementations requested, prior to the release of the FNPRM, it did so after carefully considering justifications for such EIPs. Why should any unconditional EIP recipient be required to rejustify what it has previously justified and why should the Commission be asked to reconsider what it has already considered and unconditionally granted? All EIPs unconditionally granted prior to the release of the FNPRM must be treated as grandfathered and not subject to further review and reconsideration.

Asking unconditional EIP recipients to rejustify their grants is unnecessary, as well as improper. Rejustification is unnecessary because whatever reasoning which the Commission employed to initially grant unconditional EIPs should remain intact and unchanged. Rejustification is improper because recipients of EIPs granted prior to the release of the FNPRM should be grandfathered by virtue of the timing of receipt of their EIPs and the fact that their EIPs stated no conditions other than meeting certain compliance dates for construction and Commission filings. Finally, the recipients of unconditional EIPs have spent considerable time and money in advancing their SMR networks in reliance upon Commission representations that their EIPs would remain intact, so long as the EIP recipient fully complied with the terms of its EIP. Any adjustment or reversal of unconditionally granted EIPs would cause unconscionable economic damage to recipients and their business plans as well as reduce competition within the SMR industry. Further, changes to unconditionally granted EIPs will reduce auction participation because many entities holding EIPs, like DCL, intend to bid on BEA licenses which will compliment existing EIP footprints.

Recipients of EIP's issued subsequent to the release of the FNPRM regarding Docket No. 93-144, and which are conditioned on its outcome, have been instructed that their EIPs are tentative. However, prior to the release of the FNPRM regarding Docket No. 93-144 the Commission represented that EIPs granted were final actions.

As such, EIP's pre-dating the FNPRM must be treated as grandfathered and not required to rejustify their grants.

Though it is clear that raising revenues for the Treasury has become of paramount importance to the FCC, it simply cannot ethically and morally reverse unconditional actions which it has previously taken. In fact, the legality of such reversals will undoubtedly be vigorously challenged in the courts. If the Commission is now to consider the unconscionable (and, probably, illegal) act of rescinding unconditionally granted EIPs, then it must consider whether to rescind cellular licenses, broadcast licenses, microwave licenses and all other licenses which have not been purchased via auction for the purpose of creating auctionable spectrum. When the Commission begins to rescind unconditionally granted licenses of any kind, it is inviting years of litigation while setting a precedent which will destroy all faith in the integrity of Commission licensing and representations as well as the Commission's ability to raise auction revenues.

III. Extended Implementations Granted Prior To The Release Of The FNPRM Should Not Be Subject To Reductions In Length Or Changes Of Any Kind

The terms of unconditionally granted EIPs are as critical as the EIPs themselves and must also be considered as grandfathered and untouchable. Because recipients of unconditional EIPs have been procuring funding, constructing and planning operations based upon the precise terms of their EIPs, any changes in benchmarks or reduction of the lengths of those EIPs would be disastrous. If an unconditional EIP recipient believes it has three or four years remaining in which to complete its wide area SMR system, and then its remaining construction period is suddenly reduced to two years (as currently proposed by the Wireless Telecommunications Bureau) it will be impossible to complete the proposed system in an orderly or operationally efficient manner. Essentially, the

proposed maximum extended implementation period of two years ensures that no EIP recipient can complete its planned SMR system unless it has already constructed most of its planned network.

The entire premise upon which EIP's are generally granted is that a recipient requires four or five years to construct an extremely large and complex SMR system. To then permit an EIP recipient two years to complete its system (when it may have three or four years remaining on its EIP) is a complete contradiction of the FCC's own logic employed when issuing its original EIP. The Commission has already recognized that an unconditional EIP recipient requires a certain period of time in which to fully construct its planned system. To reduce unconditionally granted EIP time frames is contradictory and illogical and will destroy countless SMR business ventures and industry competition.

IV. Any Reexamination Of Extended Implementations Must Exclude Those EIPs Issued Prior To The Release Of The FNPRM Regarding Docket No. 93-144

Though DCL fully understands the Commission's desire to clear spectrum and maximize auction revenues, the Commission must distinguish between those EIPs issued prior to or subsequent to the release of the FNPRM when considering rejustifications or other changes thereto. Just as the Commission has, for many years, recognized the importance of grandfathering certain licenses and rights to entities who received such licenses or rights prior to the adoption of new regulations, the Commission must now recognize that those entities who recieved unconditional EIPs prior to the release of the FNPRM regarding Docket No. 93-144 are grandfathered and not subject to further review and subsequent changes or cancellations.

V. Conclusion

WHEREFORE, pursuant to the above, DCL Associates, Inc. beseeches the Commission to ensure that the rights of those entities holding EIPs which were granted prior to release of the Further Notice Of Proposed Rule Making regarding Docket No. 93-144, and not conditioned on its outcome, are grandfathered and fully protected. Any review and adjustment to unconditionally granted EIPs will place the Commission in a morally indefensible position, destroy countless SMR business ventures, decrease competition in the SMR industry, decrease auction participation and revenues and result in years of costly litigation.

Respectfully submitted,

DCL ASSOCIATES, INC.

By: 

Dean C. Lovett, President
12301 Stoney Creek Road
Potomac, MD 20854
(301) 926-9360

Of Counsel:

Raymond Kowalski, Esq.
Keller And Heckman
1001 G Street, NW, Ste 500 West
Washington, DC 20001
(202) 434-4230

Dated: September 27th, 1995